No. 82-1988

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1982

BRUCE TOWER, Public Defender of Douglas County, Oregon, and GARY BABCOCK, Public Defender of the State of Oregon,

Petitioners,

v.

BILLY IRL GROVER,

Respondent.

BRIEF OF AMICUS CURIAE STATE OF FLORIDA

Appeal from the United States Court of Appeals, Ninth Circuit

JIM SMITH
Attorney General

MITCHELL D. FRANKS
Chief Trial Counsel
COUNSEL OF RECORD

JAMES A. PETERS
ERIC J. TAYLOR
Assistant Attorneys General

DEPARTMENT OF LEGAL AFFAIRS
The Capitol, Suite 1501
Tallahassee, Florida 32301
(904) 488-9935

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES CODE

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE

Florida Attorney General Jim Smith appears as amicus pursuant to Rule 36.4, Rules of the Supreme Court of the United States, to represent Florida and its public defenders. The absence of absolute immunity under §42 U.S.C. §1983 will impair Florida's criminal judicial processes, discourage recruitment of new public defenders, and encourage experienced public defenders to resign from or compromise their positions. Florida is apprehensive that the ability of its criminal courts to operate efficiently will be jeopardized if its public defenders and appointed counsel are exposed to personal liability and defense expenses in federal civil rights litigation.

This brief is submitted by Florida, by and through its Attorney General, in support of the Petitioners, Bruce Tower and Gary Babcock.

ARGUMENT SUMMARY

PUBLIC DEFENDERS SHOULD BE AFFORDED ABSOLUTE IMMUNITY FROM CLAIMS FOR DAMAGES UNDER 42 U.S.C. §1983.

The question presented is:

> Whether 42 U.S.C. §1983 authorizes a convicted person to assert a claim for damages against the public defenders who represented him at his criminal trial and appeal, on a theory that the public defenders deprived him of his constitutional rights pursuant to a conspiracy with state judges and administrative officials.

This Court has not addressed this issue in its earlier decisions. Ferri v. Ackerman, 444 U.S. 193 (1979), determined under federal law that a public defender was not entitled to absolute immunity in a state malpractice action. In Polk County v. Dodson, 454 U.S. 312 (1981), this Court found that a public defender does not act under color of state law when performing the traditional functions of defense counsel. 454 U.S. at 317, n.4.

Florida urges this Court to apply the reasoning of Briscoe v. Lahue, ___ U.S. ___ 75 L.Ed.2d 96 (1983), Robinson v. Bergstrom, 579 F.2d 401 (7th Cir. 1970), and Black v. Bayer, 672 F.2d 309 (3d Cir. 1982) and find that public defenders, whether state employed or appointed, enjoy the same immunity from liability under 42 U.S.C. §1983 as judges, prosecutors and witnesses.

I.

THIS COURT'S HOLDING IN FERRI V. ACKERMAN IS NOT CONTROLLING IN THIS CASE.

The Ninth Circuit Court of Appeals decision below relied upon and applied this Court's decision in Ferri to find Petitioners were not entitled to immunity under 42 U.S.C. §1983. Florida submits that the Ninth Circuit erroneously applied the Ferri reasoning to the facts of this case.

The issue in Ferri was whether an attorney appointed to represent a criminal defendant in a federal prosecution was entitled under federal law, to absolute immunity from civil action in a later state malpractice action. This Court found that the attorney was not so entitled to immunity, "[F]or where a state law creates a cause of action, the State is free to define the defenses to that claim,

including the defense of immunity . . ." Ferri v. Ackerman, 454 U.S. at 198.

In contrast, this case does not present a state malpractice claim; it presents an alleged civil rights violation under 42 U.S.C. §1983. This is a "federal" cause of action subject to "federal" defenses to be adjudicated in federal court. Ferri did not decide the scope of this federal cause of action or the extent to which §1983 causes may be limited by immunity defenses. Since Ferri did not decide the issue presented here, its application by the Ninth Circuit was in error. It should not be utilized as controlling authority to determine this case.

II.

POLICY CONSIDERATIONS THAT GRANT IMMUNITY TO JUDGES, PROSECUTORS AND WITNESSES ALSO APPLY TO PUBLIC DEFENDERS.

This Court has found, under common law, absolute immunity for all persons who are an integral part of the judicial process. Briscoe v. Lahue, supra. Reasons for this position lie in overriding public policy considerations.

Pierson v. Ray, 386 U.S. 465 (1967), affirmed the longstanding common law principle that judges are immune from civil liability for acts performed in the course of their official functions. It expressly held that the Civil Rights Act of 1871, 42 U.S.C. §1983, did not abolish judicial immunity:

> Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction, as this Court recognized when it

> adopted the doctrine, in Bradley v. Fisher, 13 Wall 335, 20 L.Ed. 646 (1872). This immunity applies even when the judge is accused of acting maliciously and corruptly, and it 'is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.' . . . It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation. 386 U.S. at 553-54.

The Court upheld that principle in Stump v. Sparkman, 435 U.S. 349 (1978), reh. denied, 436 U.S. 951 (1978), finding an exception "only" where a judge acts in complete absence of all jurisdiction.

Consistent with this immunity principle, Imbler v. Pachtman, 424 U.S. 409

(1976), earlier addressed the civil liability of a state prosecutor and held that "in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under §1983." 424 U.S. at 431.

> The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties. These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.
>
> * * *
>
> If a prosecutor had only a qualified immunity, the threat of §1983 suits would undermine performance of his duties no less than would the threat of common-law suits for malicious prosecution. A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office

> would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate. Cf., Bradley v. Fisher, 13 Wall, at 348, 20 L.Ed. 646; Pierson v. Ray, 386 U.S., at 554, 18 L.Ed.2d 288, 87 S.Ct. 1213. Further, if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law. 424 U.S. at 422-25.

This Court recognized that absolute immunity was applicable even where the prosecutor used perjured testimony, withheld exculpatory information, or failed to make full disclosure of all facts in doubt in the State's testimony.

In its pre-Ferri and pre-Polk County decision in Robinson v. Bergstrom, 579 F.2d 401 (7th Cir. 1978), the Seventh Circuit recognized these policy considerations when

it held public defenders are absolutely immune from §1983 liability:

> Those considerations involve the exercise of complete professionalism and include "the unfettered discretion, in the light of their training and experience, to decline to press the frivolous, to assign priorities between indigent litigants, and to make strategic decisions with regard to a single litigant as to how best his interests may be served." (citation omitted). These kinds of decisions, while similar to those of a prosecutor, are not of quasi-judicial nature as are those of the prosecutor. Yet these considerations set the public defender apart from other state agents and officials as well.

Most recently, this Court in Briscoe v. Lahue, ___ U.S. ___, 75 L.Ed.2d 96 (1983), held that witnesses are also entitled to absolute immunity. Briscoe follows immunity principles stated in Pierson and in Imbler. The decision is, again, based on common-law and public policy considerations to protect the judicial process.

III.

ABSOLUTE IMMUNITY SHOULD ALSO APPLY TO PUBLIC DEFENDERS.

The rationale of prior absolute immunity cases governed the disposition of immunity for witnesses, Briscoe v. Lahue, 75 L.Ed.2d at 114. That rationale should also govern immunity of public defenders.

Judges, prosecutors and witnesses are essential to the judicial process. So too are public defenders, whether state employed or court appointed. Under the Sixth Amendment all accused are entitled to counsel. That counsel must be free to utilize its time, best professional training and experience in its defenses:

> [D]efense counsel best serves the public, not by acting on behalf of the State or in concert with it, but rather by advancing 'the undivided interests of his client.'

Polk County v. Dodson, 454 U.S. 318, 319. Without defense counsel's freedom to act,

the judicial process would be hampered. One way to hamper the public defender would be exposure to vexatious §1983 suits (and potential liability) filed by disgruntled former clients.

Immunity is based, in part, on the need to protect the judicial process from harassment and to maintain its integrity. This Court recognized that concern in Imbler v. Pachtman, supra:

> harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.

424 U.S. at 423. This Court further found in Bricoe v. Lahue, supra:

> A witness who knows that he might be forced to defend a subsequent lawsuit, and perhaps pay damages, might be inclined to shade his testimony in favor of the potential plaintiff, to magnify uncertainties, and thus to deprive the finder of fact of candid, objective and undistorted evidence."

75 L.Ed.2d at 106. These same considerations apply to public defenders.

While defending their clients, public defenders must be free to exercise their best professional judgment without interference or without fear of reprisal by lawsuits challenging his decisions. §1983 litigation against public defenders would have a profound effect on them. It would interfere with the defenders' independent judgment. It might cause counsel to shade decisions, and attempt frivolous tactics to appease the client. The quality and credibility of the defense would suffer accordingly. It would also interfere with pending defenses in other criminal cases as time and money would be expended in pursuit of frivolous criminal defenses and in the defenses of these §1983 civil actions. Even the most frivolous of §1983 claims require some defense expenditure. The

overall result would be a dilution of defenses of indigent defendants. Consequently, absolute immunity is necessary for the public defender for "[A]bsolute immunity is . . . necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation." Butz v. Economou, 438 U.S. 478, 512 (1978). Clearly, public defenders are included among those advocates necessary to insure the integrity of the judicial system.

Further, most of the claims that would be brought under §1983 against a public defender, like Respondent's claim, are essentially malpractice claims. This Court has never allowed mere negligence claims to rise to the level of a constitutional deprivation. Parratt v. Taylor, 451 U.S. 527 (1981). Analogous are §1983 actions

against prison physicians. In Estelle v. Gamble, 429 U.S. 97, 106 (1976), this Court declined to recognize negligent medical treatment as a civil rights violation:

> . . . a complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment . . . in order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to a serious medical need. It is only such indifference that can offend 'evolving standards of decency' in violation of the Eighth Amendment.

This Court has not permitted medical negligence to rise to the level of a constitutionally protected violation. Public policy, the need for insuring the integrity of the judicial system, preventing the filing of harassing suits by disgruntled clients in federal court, dictate that negligence by a public defender should not also be elevated to a constitutionally protected status.

IV.

THE DECISION OF THE THIRD CIRCUIT IN BLACK V. BAYER WAS CORRECT.

The only Court to decide this issue since Ferri v. Ackerman, supra, and Polk County v. Dodson, supra, is the Third Circuit. In Black v. Bayer, 672 F.2d 309 (3d Cir. 1982), defendant public defenders included both state employed and court appointed counsel. The court found no reason for different results based on the nature of employment. Holding that public defenders, acting within the scope of their professional duties, were absolutely immune from civil liability under §1983, the court reaffirmed the rule of Brown v. Joseph, 463 F.2d 1046 (3d Cir. 1972), cert. denied, 412 U.S. 950 (1973):

> To subject this defense counsel to liability, while cloaking with immunity his counterpart across the counsel table, the clerk of the court recording the minutes, the

> presiding judge, and counsel of co-defendant, privately retained or court-appointed, would be to discourage recruitment of sensitive and thoughtful members of the bar. Complaints under the Civil Rights Act, like the one at bar, are usually pro se. These receive special treatment, favorable to plaintiff. Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594 [595] 30 L.Ed.2d 652 (1972). Except where patently frivolous, they may be filed without the payment of a filing fee by indigents. Unlike complaints sounding in common law or statutory tort, public policy dictates that they be broadly interpreted in favor of inclusion, rather than exclusion. Valle v. Stengel, 1976 F.2d 697, 702 (3d Cir. 1949). To deny immunity to the Public Defender and expose him to this potential liability would not only discourage recruitment, but could conceivably encourage many experienced public defenders to reconsider present positions.

Black, at 319, quoting Brown v. Joseph.

This is a real concern in Florida with its large prison population. Records of the United States District Court for the Middle District of Florida evidences massive §1983 prisoner litigation. If this

Court were to permit public defenders to be exposed to potential §1983 liability, sentenced prisoners would have other targets for their vindictive litigation. As noted in Robinson at 410:

> [t]he experience of the federal courts in federal habeas corpus and §1983 litigation demonstrate that indigents more frequently attempt to litigate claims which are patently without merit than do non-indigent parties.

For an example of the proliferation of such frivolous cases one prisoner can produce, see Procup v. Strickland, 567 F.Supp. 146 (M.D. Fla. 1983).

The Third Circuit recognized that both time and money would be diverted from the public defender's primary duty, to defend indigents, 672 F.2d 319. Accused indigents deserve the public defender's full attention to their cases. Precious time taken from the criminal defense would lead to ineffective assistance of counsel charges and related appeals.

As noted in Black, even without a §1983 remedy, the criminal defendant has many other avenues to seek redress if there was ineffective assistance or malpractice, 672 F.2d 320. A convicted criminal defendant can raise these issues on appeal or at other post-trial proceedings, including state and federal habeas corpus petitions. He also may present a state malpractice claim. Or, he may file a complaint with the state bar.

This Court's recognition that public defenders are entitled from absolute immunity to civil rights suits will not leave the client, convicted or not, without a remedy. Rather, it will direct that suit into traditional forums for review.

CONCLUSION

Florida submits that the Ninth Circuit Court of Appeals misapplied this Court's decisions when it decided that public defender liability did not exist under 42 U.S.C. §1983. The decisions and analyses of the Third Circuit in Black v. Bayer, and of the Seventh Circuit in Robinson v. Bergstrom, are correct. Policy considerations dictate that public defenders have the same immunity from civil process as judges, prosecutors and witnesses. Public defenders must be absolutely immune from civil liability under 42 U.S.C. §1983 for all acts done within the scope of their

professional duties. The decision of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

JIM SMITH
Attorney General

MITCHELL D. FRANKS
Chief Trial Counsel

JAMES A. PETERS
Assistant Attorney General

ERIC J. TAYLOR
Assistant Attorney General

Department of Legal Affairs
The Capitol, Suite 1501
Tallahassee, Florida 32301
(904) 488-9935